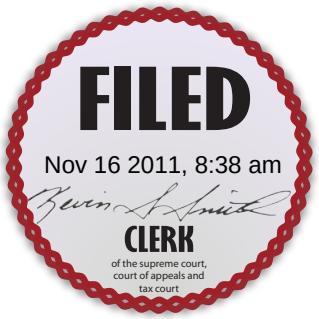

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IN THE
COURT OF APPEALS OF INDIANA

DANIEL STEVENSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1103-CR-124
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Shelia A. Carlisle, Judge
Cause No. 49G03-0707-FA-136390

November 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Daniel Stevenson appeals his convictions for two counts of child molesting as class A felonies, sexual misconduct with a minor as a class B felony, and sexual misconduct with a minor as a class C felony. Stevenson raises one issue which we revise and restate as whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error. We affirm.

The relevant facts follow. When B.C. was about five or six years old, her mother began dating Stevenson, whose date of birth was December 19, 1967. Stevenson and B.C.'s mother married and B.C. lived with them and with B.C.'s brother and sister. When B.C. was ten or eleven years old, Stevenson touched B.C. "in a way he wasn't supposed to." Transcript at 20. Specifically, B.C. and Stevenson were alone in the computer room of the house, and Stevenson picked B.C. up and asked her to "straddle him" as he sat on the computer chair. Id. at 21. B.C. was facing Stevenson, and he "started moving [her] back and forth" with his hands on her waist. Id. at 22. Stevenson "was grinding [her] vagina against his penis." Id. At some point, Stevenson's penis and B.C.'s shorts became wet and Stevenson claimed that he spilled a beer. B.C. did not tell her mother because she was scared that her mother would not believe her and scared that it would "make her [mother's] condition worse because she had cancer." Id. at 24.

B.C. was eleven years old when her mother died of lung cancer on April 4, 2002. After B.C.'s mother died, B.C. lived in a house with Stevenson, her sister, her brother, her stepbrother, and Stevenson's girlfriend. B.C. shared a bedroom with her sister. In May 2002, B.C. had strep throat, and Stevenson told B.C. that he did not want B.C. in her

room and told her to sleep in his room "so he could watch" her. Id. at 26. When B.C. went to Stevenson's room, he told her to take off her pants because it would make her fever go down, and B.C. complied. Stevenson began rubbing his hand on the inside of B.C.'s thighs.

When B.C. was eleven or twelve years old, Stevenson moved to a different house, and B.C. and her sister shared a room. Stevenson touched B.C. two or three times a week while they lived in this house. Specifically, sometimes B.C. would arrive at home before everyone else and she would be home alone with Stevenson. Stevenson took B.C. into his room and told her to "get on the bed" and he would pull down B.C.'s pants and panties. Id. at 30. Stevenson then took off his pants, pulled his penis through his boxers, climbed on top of B.C., and placed the head of his penis in B.C.'s vagina. Before he placed his penis in B.C.'s vagina, he would say "[j]ust going to put the head in." Id. at 31. Stevenson then began moving his body up and down. Sometimes B.C. would fight back and other times she would "just lay there, because he held [her] arms down sometimes." Id. at 32. Stevenson would then ejaculate in his hand. Stevenson once ejaculated on B.C.'s thigh and then told her to take a shower. Stevenson also touched B.C.'s chest, placed his mouth on her chest, and grabbed B.C.'s butt.

When B.C. was in the seventh grade and was twelve or thirteen years old, Stevenson and the family moved to another house around the corner, and B.C. had her own room. Stevenson again touched B.C. at night or after school about three or four times a week. Specifically, Stevenson would put his penis in B.C.'s vagina and tell her

that he loved her. Stevenson told B.C. to give his penis a kiss, and B.C. complied. Stevenson also touched B.C.'s vagina with his hand and kissed her chest.

At some point during B.C.'s seventh grade year, she told her best friend and another girl that her dad was molesting her. B.C.'s best friend told her mother, and CPS went to B.C.'s school. CPS took B.C. to the hospital where a rape kit was performed. When they asked if her father had been molesting her, B.C. said "[n]o" because she was scared of being hurt as Stevenson had told her that he would kill her if she ever told anybody. Id. at 47. B.C. was also scared that she and her siblings would be separated.

When B.C. was in the eighth grade, the family moved to Franklin. While in Franklin, Stevenson "would stick his penis in [B.C.'s] vagina" and place his penis in B.C.'s mouth. Id. at 40. This occurred "more often than [in] the other houses . . . ." Id.

The family left Franklin and moved again while B.C. was still in the eighth grade and was about thirteen or fourteen years old. At this point, Stevenson and his girlfriend ended their relationship, and B.C. slept in Stevenson's room with the door locked because Stevenson "didn't trust [B.C.'s] brothers." Id. at 42. Stevenson "would make [B.C.] rub . . . his penis." Id. at 44. Stevenson also "would stick his penis" in B.C.'s vagina and put his penis in B.C.'s mouth. Id. This occurred almost every day. Stevenson would not allow B.C. to have friends, go out, or talk to people. Stevenson told B.C. that she was not allowed to have boyfriends because he was in love with her.

When B.C. was in the beginning of ninth grade and fourteen years old, B.C. met Debrah Twitty, the mother of a friend at school. B.C. told Twitty that her father had been

molesting her. Twitty told B.C. that B.C. should call her the next time that Stevenson did anything so that his bodily fluids would still be on her. At some point, Stevenson removed B.C.'s shorts, pulled her panties down, and put his penis in B.C.'s vagina but did not ejaculate. At that point, Stevenson's mother arrived in the house, and Stevenson went downstairs to talk to her. B.C. left the house and went to the store with her sister and called Twitty. At some point, Twitty and B.C. had told Stevenson that Twitty was B.C.'s teacher and that B.C. was going to babysit. B.C. then went back home, and Stevenson's mother left five minutes later. Stevenson then told B.C. that her teacher was coming to pick her up so that she could babysit and that he "wanted to hurry up and finish before she got there." Id. at 55. Stevenson again pulled down B.C.'s pants and panties and placed his penis in her vagina. Stevenson ejaculated and then "kind of stumbled" and tried to "jump up, because he would pull out before and try to catch it in his hand." Id. at 56. B.C. was wearing a cami when Stevenson finished. Stevenson told B.C. to "wash up before the lady" arrived, and B.C. told Stevenson that she "was fine" and would take a shower when she arrived home. Id. Twitty arrived and took B.C. to the hospital. Seminal material was later identified on the camisole top. The sperm fraction and epithelial fraction of the sample from B.C.'s camisole matched a DNA sample from Stevenson to a "reasonable degree of scientific certainty" or "1 in 30 quadrillion."[1] Id. at 204-205.

[1] The DNA analyst testified: "When I said 'scientific certainty', it's because when I ran the statistics on it, it was 1 in 30 quadrillion, the probability that that sample matches, meaning I would have to look at 30 quadrillion other samples before I could find that profile again." Transcript at 205.

On July 13, 2007, the State charged Stevenson with: Count I, child molesting as a class A felony; Count II, sexual misconduct with a minor as a class B felony; and Count III, sexual misconduct with a minor as a class C felony. On November 3, 2010, the State moved to amend the information by adding Count IV, child molesting as a class A felony, and the court later granted the motion.

During the jury trial, B.C. testified to most of the foregoing facts. B.C.'s sister, Br.C., testified that B.C. would sleep in Stevenson's room and that at night the bedroom doors would be closed and locked because it was Stevenson's rule. Br.C. also testified that the last day that she lived with Stevenson she went to the store with B.C. and B.C. used the pay phone. Twitty testified that B.C. told her that Stevenson was having intercourse with her. Twitty testified that she told B.C. to call her the next time that B.C. had intercourse with Stevenson. Twitty also testified that after she picked up B.C., B.C. was "[v]ery nervous, very scared, kind of on the quiet side." Id. at 117. Stevenson testified that on the day that Twitty came to his house, he was watching a pornographic movie, ejaculated at some point, and attempted not to drop any semen. Stevenson also testified that B.C. wore the same shorts that he wore when he masturbated.

After the parties rested, Stevenson's attorney stated that he noticed that one of the State's placards had what "appear[ed] to be a quote that the jury could convict on the uncorroborated testimony of one witness." Id. at 255. Stevenson's attorney objected to the State using the placard in their closing statement. The court sustained the objection. Specifically, the court stated:

> I'm going to sustain the objection as far as using that diagram. It's pretty big. It is not acceptable for the Court to instruct that way, and I don't want them to think in any way that your use of a diagram that big in closing argument implies that the Court is sanctioning that.

Id. at 256. During closing argument, the prosecutor stated: "If you believe B.C., then you can convict. That's the law in the state of Indiana." Id. at 264. Stevenson did not object to this statement. The jury found Stevenson guilty as charged. On February 25, 2011, the court sentenced Stevenson to an aggregate sentence of fifty years.

The issue is whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error. Stevenson appears to focus on the prosecutor's comment during closing argument that "[i]f you believe B.C., then you can convict. That's the law in the state of Indiana." Id. at 264. Stevenson argues that "[b]ecause the argument was explicitly presented as a statement of the law, the impact on the jurors was no different than if the same language had been used in an instruction." Appellant's Brief at 12. Stevenson argues that the prosecutor's comments had the same effect on the jury "as if the trial court had given the prohibited instruction." Appellant's Brief at 11. Stevenson also argues that the prosecutor's misconduct placed him in a position of grave peril because the State's case against Stevenson was not overwhelming.

The State argues that Stevenson "failed to establish misconduct, let alone fundamental error." Appellee's Brief at 5. The State argues that the prosecutor did not misinform or mislead the jury. The State concedes that Stevenson is "correct that the Indiana Supreme Court has found that the use of the language that a conviction may be

sustained on the testimony of a single witness or victim is improper in a jury instruction." Id. at 6 (citing Ludy v. State, 784 N.E.2d 459, 461-462 (Ind. 2003). However, the State argues that "the present case does not involve a jury instruction; rather, this case simply concerns statements made during final argument." Id. The State also argues that even if the prosecutor's comments had constituted misconduct, the court's instructions would have alleviated any prejudicial impact from the brief comments.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. Id. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Id. Failure to request an admonishment or to move for mistrial results in waiver. Id. Here, Stevenson did not object to the prosecutor's closing argument and did not request an admonishment or a mistrial. Thus, Stevenson has waived the issue.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm." Id.

Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. Ham v. State, 826 N.E.2d 640, 641-642 (Ind. 2005). However, Stevenson does not challenge the court's instructions. Rather, Stevenson challenges the prosecutor's statements. "It is proper for a prosecutor to argue both law and fact during final argument and propound conclusions based upon his analysis of the evidence." Poling v. State, 938 N.E.2d 1212, 1217 (Ind. Ct. App. 2010). We cannot say that the prosecutor committed misconduct. See Weis v. State, 825 N.E.2d 896, 904-905 (Ind. Ct. App. 2005) (holding that "[t]he mere fact that a jury may not be instructed on a certain point of law does not lead to the conclusion that argument concerning that point of law is also improper" and rejecting the defendant's argument that the prosecutor improperly informed the jury that it could convict the defendant on the sole basis of the victim's testimony); see also Poling, 938 N.E.2d at 1217 (rejecting the defendant's claim of prosecutorial misconduct in part because the prosecutor read the

statute during closing argument instead of the trial court reading the statute and concluding that there was no misconduct much less fundamental error); see also Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) ("[A]lthough evidence of flight may, under appropriate circumstances, be relevant, admissible, and *a proper subject for counsel's closing argument*, it does not follow that a trial court should give a discrete instruction highlighting such evidence.") (Emphasis added).

We are not persuaded that the comments during the prosecutor's closing argument created "an undeniable and substantial potential for harm." Cooper, 854 N.E.2d at 835. We cannot say that the prosecutor focused solely on B.C.'s testimony as the prosecutor also argued:

> Let's talk about corroboration, though. You don't just have B.C.'s testimony. You have corroboration. [Br.C.] testified. She confirmed to you that the defendant was sleeping in B.C.'s room at times in the house where B.C. had her own bedroom. She confirmed that B.C. and the defendant were shearing [sic] a bedroom in the last home. The defendant himself confirmed that. And then the DNA evidence, his sperm on her shirt.
>
> B.C. was 14 years old. You saw her yesterday at age 20. She's still very small. But she was wearing a size 10, which has to be a size 10 little girl's top, on the day of October 20, 2005, when she went to the hospital. His sperm just happens to be on the inside of that shirt from where he ejaculated on her that day.
>
> Now let's talk about what the defendant told you, that he just happened to masturbate that day that he just happened to be masturbating with a pair of black and white shorts, that he just happened to let his daughter wear that day to the store, that you know there's no way there's a pair of shorts that that man could fit and B.C. – B.C. could also fit, wearing a size 10 little girl's top.

It doesn't make sense. It's not believable.

Transcript at 266-267.

Further, none of the court's instructions emphasized B.C.'s testimony. Rather, the court instructed the jury that "[u]nder the Constitution of Indiana you have the right to determine both the law and the facts. The Courts [sic] instructions are your best source in determining the law." Appellant's Appendix at 76. The instructions informed the jury as to the defendant's presumption of innocence and that the State must prove the elements of each offense beyond a reasonable doubt. Preliminary Instruction Number 15 informed the jury, in part, that "[a] Defendant must not be convicted on suspicion or speculation." Id. at 91. Preliminary Instruction Number 16 stated: "You are the exclusive judges of the evidence," and "[y]ou should give the greatest value to the evidence you find most convincing." Id. at 92. Preliminary Instruction Number 17 states: "Your verdict should be based only on the evidence admitted and the instructions on the law." Id. at 93. Preliminary Instruction Number 20 states:

> When the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Id. at 96. Lastly, Final Instruction Number 24 states: "Statements made by the attorneys are not evidence." Id. at 101.

Given the prosecutor's remaining arguments and the jury instructions, we conclude that any prejudicial impact caused by the prosecutor's statements was minimal

and that the prosecutor's statements do not constitute fundamental error. See Surber v. State, 884 N.E.2d 856, 866 (Ind. Ct. App. 2008) (holding that even assuming the prosecutor's comments constituted misconduct they did not constitute fundamental error), trans. denied.

For the foregoing reasons, we affirm Stevenson's convictions for two counts of child molesting as class A felonies, sexual misconduct with a minor as a class B felony, and sexual misconduct with a minor as a class C felony.

Affirmed.

BAKER, J., and KIRSCH, J., concur.